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Supreme Court of the United States

OCTOBER TERM, 1947

No.....

JOHN PORTER MONROE,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, to review a judgment of that Court entered in this case on November 14, 1947 (R. 827), affirming a judgment of the United States District Court for the Southern District of New York (R. 808-9), entered after a jury verdict in a criminal prosecution for alleged conspiracy and violations of the maximum price regulations issued under the authority of the Emergency Price Control Act (50 U. S. C. App. §§ 901 *et seq.*).

Opinions Below

The District Court rendered no opinion except that when it admitted petitioner to bail, the Court stated in

part (R. 767): "I am somewhat perplexed and I think there may be some substantial question of law involved here * * * This case, while it was being tried perplexed me quite some, and for that reason I am glad to let the Circuit Court of Appeals pass on it."

The opinion of the Circuit Court of Appeals (A. N. HAND, CLARK, and FRANK, JJ.) has not yet been reported, but is printed in the Record at pages 815 to 826.

Jurisdiction

The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. § 347 [a]), and under Rule 37 (b) (1) (2) of the Federal Rules of Criminal Procedure promulgated by this Court pursuant to the provisions of U. S. C., tit. 18, § 688.

The Circuit Court of Appeals affirmed the judgment of conviction of petitioner on November 14, 1947 and judgment was entered on the same day. This petition is filed within thirty days from the date of the entry of said judgment. Rule 37(b)(2) of the Federal Rules of Criminal Procedure.

Summary Statement of Matter Involved

(1)

Petitioner was indicted, along with four other defendants, for allegedly conspiring to violate the Emergency Price Control Act and for allegedly selling, offering to sell and delivering finished piece goods at prices in excess of those fixed by Maximum Price Regulation No. 127 (R. 9-31). One Abner Berman was named as a co-conspirator but not as a defendant (R. 9).

The only possible conspiracy of which petitioner could have been convicted was with Berman, the alleged co-

conspirator who was not indicted. In his charge to the jury, the District Judge said (R. 756):

> "The indictment charges him [Berman] as a co-conspirator, *and his evidence establishes it conclusively.*"*

This charge, in effect, instructed the jury that a conspiracy existed and that the evidence "conclusively" established that Berman was a party to that conspiracy. Among all the defendants, Berman's dealings were solely with petitioner. The two shared most of the fees in connection with the various transactions and the acts and conduct of the two could not be separated. Since the acts and conduct of petitioner and Berman were so interrelated, the charge was grossly prejudicial to petitioner. For if Berman was a conspirator, "conclusively" established by the Court's charge, petitioner must have been part of that conspiracy. Since the jury found a conspiracy in which only two persons were involved, the guilty knowledge of Berman was as essential an element as that of petitioner, and on this essential element, the Court directed a verdict. The most vital issue in the case on the conspiracy charge was thus removed from the jury's consideration.

(2)

The applicable Regulation (MPR 127), in force at the time the transactions charged in the indictment took place, prohibited the sale or delivery of finished piece goods at prices higher than the maximum prices therein set forth (§ 1400.71). The price limitations were not to be evaded, directly or indirectly, "by way of commission, service, transportation, or other charge, or discount, premium or other privilege, or tying-agreement, or other trade understanding, or otherwise" (§ 1400.74).

Petitioner was not the owner of finished piece goods and had no goods to sell. The pattern of the transactions in

* Emphasis throughout this petition and the accompanying brief is supplied, unless otherwise noted.

which petitioner was involved was simply this: Either he or Berman (the co-conspirator not indicted) would contact a prospect and, if the prospect expressed a desire to buy merchandise, petitioner would obtain a contract from Verney Fabrics Corporation by the terms of which Verney Fabrics Corporation contracted to sell to the prospect a quantity of merchandise at a certain price (see *e. g.*, R. 152, 773 [a] [b]). Concededly, the price set forth in the contract was the exact ceiling price as fixed by the Regulations (R. 445). The purchaser would pay petitioner, or Berman, a fee or commission, and the contract price would be paid directly to the factor for Verney Fabrics Corporation (see *e.g.*, R. 442-445). There was no proof that any part of the fee paid to petitioner or Berman was ever turned over to Verney Fabrics Corporation or any of its officers.

The Court charged the Jury (R. 752) that if petitioner's efforts were performed "as a service for the sellers" then "if the selling price, including the fees charged by Monroe [petitioner] were in excess of the ceiling price, violations of the substantive counts would be established". In substance, therefore, the Court charged that any independent consideration received by petitioner, no part of which went to the seller, was to be added to the seller's contract price and, if the addition of the two figures exceeded the ceiling price, violation of the statute would be established.

There is nothing in the statute or Regulation which would make the receipt of a fee, independent of the selling price, by a person not the seller, a crime. In fact, it was not until after petitioner's conviction that Maximum Price Regulation No. 127 was amended so as to provide that "the amount paid by the buyer to the seller plus any amount paid by the buyer to the broker shall not exceed the seller's maximum price" (§ 1400.88), the word "broker" being defined to include "seller's agent". Thus, the conduct which the District Court defined to be criminal was not so declared by the Price Administrator until more than six

months after petitioner's conviction. Hence petitioner was convicted of acts which were not crimes at the time of the transactions in question.

(3)

Petitioner, both in the caption and in each of the thirty counts of the indictment was designated as "Monroe Kaplan, alias 'John Porter Monroe' ". Throughout the seven-day trial, petitioner, by agreement, was referred to by the prosecuting attorney and witnesses as "Monroe". Petitioner had changed his name legally in 1940 (R. 761), and no reason appears in the Record as to why the indictment referred to him as "alias John Porter Monroe", nor did the Government offer any reason in the Circuit Court of Appeals.

After the jury had retired for its deliberation, they requested the indictment (R. 761). Petitioner's counsel objected to sending the indictment to the jury but was overruled (R. 762). After petitioner's objection to the submission of the indictment to the jury because of the "alias" designation, the Assistant United States Attorney offered to excise the name "Kaplan" from the indictment in each of the 35 places it appeared. This would have left 35 holes in the indictment and the name "John Porter Monroe" *in quotation marks* after each hole and in a different type format from that used to designate the other defendants.*

The Judge explained to the jury that petitioner had changed his name legally in 1940; that it was agreed to refer to him as Monroe throughout the trial; and since they had requested the indictment, he wanted them to know "'alias' means nothing but another name" (R. 761-2). He further explained that, while people attach criminal

* While the printed record does not show the difference in type format, the typewritten indictment read "John Porter Monroe" in lower case, and the names of the other defendants were in upper case.

significance to that term, "tha[illegible]lly isn't any except perhaps as that innuendo has cr[illegible]nto use by the use of that term" He cautioned the jury not to be prejudiced against petitioner because of that fact (R. 762).

With the submission of the indictment to the jury, its deliberations were colored by a document containing an "alias" in petitioner's name. The obvious effect, realistically, was to cause ordinary jurors to believe that petitioner was a sinister character, a man with a criminal record. The practice of putting an unnecessary and unwarranted alias into an indictment is *inherently* prejudicial as the Circuit Court of Appeals agreed (R. 826). Although petitioner's trial counsel objected to the submission of the indictment to the jury, the trial judge, without any necessity for it, nevertheless gave the indictment to the jury. The Circuit Court of Appeals apparently failed to pass upon petitioner's timely objection and confined itself to ruling that in the absence of a request for a further instruction thereafter it would not reverse (R. 826).

Questions Presented

1. Where there is an erroneous instruction which, in effect, directs a verdict on an essential element of the offense, may it be held to be not "plain error" under Rule 54(b) of the Federal Rules of Criminal Procedure?

2. May a broad construction be given to a penal statute or regulation so as to make an act criminal where neither statute nor regulation specifically prohibits the conduct held to be criminal by the trial court?

3. Is not the practice of indicting a person with the designation of an alias which is wholly unwarranted, and the submission of the indictment to the jury in that form, over objection, prejudicial and inconsistent with accepted standards of fair trial and due process of law?

Reasons for Allowance of the Writ

The Circuit Court of Appeals has passed on three important questions which seriously affect the rights of a defendant in a criminal case. Its decision constitutes in some respects a departure from the accepted course in judicial proceedings and in others involves what we deem rulings which run counter to applicable decisions of this Court.

(1)

The District Court in referring to Berman, the alleged co-conspirator who was not named as a defendant, charged the jury (R. 756):

> *"The indictment charges him as a co-conspirator, and his evidence establishes it conclusively."*

In so charging, the Court, in effect, instructed the jury that a conspiracy existed and that Berman was conclusively established to be a party to that conspiracy. This charge took from the jury's consideration the basic question on the conspiracy count and in view of the relationship between petitioner and Berman was tantamount to a direction of a verdict against the petitioner.

The Circuit Court's decision, holding that because of the failure of trial counsel to except to the charge it would disregard the alleged error since, in its opinion, it was not "plain error" which the Court will consider under Rule 54(b) "when no exceptions were taken below" (R. 820), is in conflict with the decisions of this Court in *Screws* v. *United States,* 325 U. S. 91, 107 (1945); *Bollenbach* v. *United States,* 326 U. S. 607, 613 (1946); *Bihn* v. *United States,* 328 U. S. 633, 638-639 (1946), and other cases which have laid down the rule that an Appellate

Court will not permit a conviction to stand in the face of an erroneous charge on a vital issue, even though the charge be not excepted to, and that a misdirection on a basic issue cannot be treated as harmless error.

(2)

On the substantive counts of the indictment, petitioner stands convicted of crimes which were not offenses at the time the transactions charged in the indictment took place, if the statute and applicable Regulations are read in accordance with established standards of construction of criminal statutes.

Section 1400.71 of Maximum Price Regulation No. 127 prohibited the *sale* or delivery of finished piece goods at prices higher than the maximum prices therein set forth.

Section 1400.74 dealt with "evasion" and provided that the price limitations shall not be evaded by way of commission, service, or other charge.

The prohibitions both in the statute and Regulations apply to the seller and it is the seller who may not evade the price limitations. Nowhere in the statute or Regulations is there a prohibition against a person other than the seller receiving an independent consideration from the buyer. Nevertheless, the Court in addition to charging the jury that the petitioner could be convicted as a seller also charged that if the petitioner's services were performed as a service for the sellers, then the fees charged by him should be considered as part of the total price; and if the selling price including the fees charged by petitioner exceeded the ceiling price, violations of the substantive counts would be established (R. 752).

This charge was wrong because there was nothing in the applicable Regulations in force at the time of the transactions in question which interdicted the receipt of a com-

mission independent of the selling price by a person not the seller. It was not until more than six months after petitioner's conviction that the evasion section applicable to the finished piece goods industry was amended so as to bring within the proscribed conduct payment of a fee to a seller's agent. This subsequent amendment of the Regulation cannot, of course, be given retroactive application. *United States Constitution,* Art I, § 9, cl. 3. It does point the fact that the Administrator himself did not consider his prior regulation sufficiently broad to cover a fee received by a seller's agent.

If the Administrator's intention had been to prohibit the receipt of such independent consideration at the time of the acts charged in the indictment herein, he should have so declared in the Regulations. In fact, in other industries, the Regulations in force at that time were specific and expressly prohibited the receipt of an independent consideration by a seller's agent.

In holding that under the statute and Regulations the fee received by the petitioner was to be added to the selling price, the Circuit Court's decision is in conflict with the decision of this Court in *Kraus & Bros.* v. *United States,* 327 U. S. 614 (1946), where it was held that the Price Administrator's provisions must be explicit and unambiguous to sustain a criminal prosecution and that they must adequately inform those who are subject to their terms which conduct will be considered evasive. The applicable principles which should govern the interpretation of administrative regulations, as laid down by this Court in the *Kraus* case, violations of which involve criminal penalties, require a holding that the receipt of an independent consideration by a seller's agent did not fall within the scope of the administrative regulations. The Trial Judge's charge to the contrary was, therefore, erroneous and the Circuit Court's affirmance of that charge is contrary to the *Kraus* decision. See also *McBoyle* v. *United States,* 283 U. S. 25

(1931), where this Court reversed a conviction because the opinion below violated the settled rule as to strict construction of criminal statutes.

(3)

The final point passed on by the Circuit Court is one which is important in the fair administration of the criminal law and which should finally be settled by this Court.

The Circuit Court while agreeing that it is an improper practice to indict a defendant with an "alias" designation, unless some valid reason exists, nevertheless held that the rights of the petitioner had not been prejudiced.

This practice of indicting by alias, particularly where a defendant has no criminal record, is a practice which should be stopped by the authoritative declaration of this Court. Judges have from time to time condemned the practice because it is obviously prejudicial to the rights of a defendant. In this case, for example, the jury was not aware that the petitioner had been indicted as "Monroe Kaplan, alias John Porter Monroe" until they had retired for their deliberation. Significantly, all the defendants except the petitioner, whose name appeared with the "alias" appendage in the indictment which the District Judge submitted to the jury over objection, were acquitted.

No reason of any kind was advanced by the Government for so indicting the petitioner and under all the circumstances of this case it injected an element into the jury's deliberations which seriously affected the petitioner's rights. The requirements of due process are seriously affected by such procedure and this Court should lay down a clear rule for the guidance of the courts in dealing with a practice which is extremely prejudicial and which may tip the scales unfairly against a defendant in a criminal case.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Circuit Court had in the case, numbered and entitled on its docket, No. 20723, *United States of America,* Plaintiff-Appellee v. *Monroe Kaplan, alias "John Porter Monroe",* Defendant-Appellant, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated: December 12, 1947.

JOHN PORTER MONROE,
Petitioner.

By: MURRAY I. GURFEIN,
Attorney for Petitioner.

Certificate of Counsel

I hereby certify that in my judgment the foregoing petition is well founded and that it is not interposed for delay.

Dated: December 12, 1947.

MURRAY I. GURFEIN,
Attorney for Petitioner and a Member of the Bar of this Court.

Supreme Court of the United States

OCTOBER TERM, 1947

No.....

JOHN PORTER MONROE,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Statutes Involved

The Federal statutes involved are the Emergency Price Control Act (50 U. S. C. App. §§ 901 *et seq.*), pertinent portions of which are set forth under Point II, *infra,* pp. 23-24 and 27, and Criminal Code § 37 [conspiracy] (18 U. S. C. § 88).

Statement of the Case

The pertinent facts have already been set forth in the preceding petition (*ante,* pp. 2-10) which is hereby adopted and made a part of this brief. In the interest of brevity, they will not be repeated here, but whenever relevant will be referred to under the respective points of the argument.

Specification of Errors to be Urged

The Circuit Court of Appeals for the Second Circuit erred:

1. In holding it was not reversible error for the Court to charge that Berman was charged in the indictment as a co-conspirator *"and his evidence establishes it conclusively"*.

2. In holding it was not reversible error to charge that petitioner could be convicted as an agent for the seller, if his fees from the buyers when added to the seller's selling prices, exceeded the maximum ceiling prices fixed by the Regulations.

3. In refusing to apply the rule of strict construction to a criminal regulation, and in holding that the Regulations in force at the time of the transactions charged in the indictment prohibited the receipt of an independent consideration from the buyer by a person other than the seller even though no part of the independent fee went to the seller.

4. In holding that it was not reversible error to submit the indictment to the jury where petitioner, without any justifiable basis, was designated as "Monroe Kaplan, alias 'John Porter Monroe' ", although he had legally changed his name to "Monroe" years before the transactions involved.

ARGUMENT

Summary of Argument

I. The Court's charge that Berman was named as a co-conspirator in the indictment, and that his evidence establishes it "conclusively", was so erroneous and prejudicial as to require a reversal of the entire judgment of conviction. The failure of the Circuit Court of Appeals to reverse upon the ground that no exception was taken below is in conflict with the decision of this Court in *Screws* v. *United States,* 325 U. S. 91 (1945).

II. The Court charged that petitioner could be convicted as an agent for the seller where the sum of his fees from buyers (not shared with the seller), added to the selling price, was in excess of the ceiling price. There is nothing in the statute (50 U. S. C. App. § 901) or the piece-goods Regulation (M. P. R. 127) to justify the charge. The strict construction of criminal statutes and regulations was utterly disregarded and the lower courts failed to follow *Kraus & Bros.* v. *United States,* 327 U. S. 614 (1946). The Circuit Court of Appeals applied a canon of construction which violated the constitutional guaranty of due process of law. *Connally* v. *General Construction Co.,* 269 U. S. 385, 391 (1926).

III. The submission of the indictment to the jury, over petitioner's objection, wherein petitioner, without any justifiable basis, is designated as "Monroe Kaplan alias 'John Porter Monroe'," although he had legally changed his name to "John Porter Monroe" five years before the transactions charged in the indictment, deprived the petitioner of due process of law and seriously affected the fairness of the judicial proceeding.

POINT I

The Court's charge that Berman was named as a co-conspirator in the indictment, and that his evidence establishes it "conclusively", was so erroneous and prejudicial as to require a reversal of the entire judgment of conviction. The failure of the Circuit Court of Appeals to reverse upon the ground that no exception was taken below is in conflict with the decision of this Court in *Screws* v. *United States*, 325 U. S. 91 (1945).

1. *The Court's improper charge took from the jury's determination a vital issue in the case.*

The conspiracy count charged the defendants Verney, Biggi, Verney Mills, Verney Fabrics and petitioner, together with Berman (not named as a defendant), and "divers other persons whose names are to the Grand Jurors unknown" (R. 9) as "conspirators". Gilbert Verney was acquitted by direction; all other defendants except petitioner were acquitted by the jury (R. 456, 763). Petitioner stands as *the only person convicted of conspiracy.*

The only conspiracy on which the conviction could possibly be sustained is between petitioner and Berman. The allegation of conspiracy with "other persons unknown" can readily be disregarded, as there was no proof with respect to that allegation.* *Bartkus* v. *United States*, 21

*The respective buyers cannot, of course, be considered "other persons unknown," because all those named in the substantive counts were known to the Grand Jury. The only buyer not named in the substantive counts was Wood, and the proof is clear that he entered into no general conspiracy. Moreover, to establish a conspiracy the evidence must convince that the defendants did something other than participate in the substantive offense which is the object of the conspiracy. There must, in additon, be proof of the unlawful agreement. *Dickerson* v. *United States*, 18 F. (2d) 887, 893 (C. C. A. 8, 1927); see also, *Di Bonaventura* v. *United States*, 15 F. (2d) 494, 495 (C. C. A. 4, 1926); *Fisher* v. *United States*, 13 F. (2d) 756, 757 (C. C. A. 4, 1926). This could not possibly be applied to the buyers in this case, particularly since it was "a part of said conspiracy" to *cause* purchasers to pay cash in excess of ceiling prices (R. 10).

F. (2d) 425, 428 (C. C. A. 7, 1927); *Worthington* v. *United States,* 64 F. (2d) 936, 939 (C. C. A. 7, 1933). In fact, no mention was made either in the course of the trial or in the instructions to the jury concerning the "other persons unknown" (cf. *Whitaker* v. *United States,* 72 F. (2d) 739, 741 (App. D. of C. 1934); *United States* v. *Cunningham,* 40 F. Supp. 399, 402 (D. C. Ga. 1941); and certainly no statement was given to the effect that their intent to enter into a corrupt agreement had to be established as an essential element in order to find the petitioner guilty of conspiracy with them.

We are remitted, therefore, to the conviction of petitioner alone as based on a conspiracy *solely with Berman.*

The following erroneous instruction of the court is consequently of utmost significance; the judge charged (R. 756):

> "The indictment charges him [Berman] as a co-conspirator, *and his evidence establishes it conclusively.*"

The intent of Berman and his participation in a conspiracy were essential elements to be proved. Without proof of these elements beyond a reasonable doubt the conviction of petitioner alone can not stand. For where there are only two parties to a conspiracy, "a corrupt agreement" and "guilty knowledge on the part of *each*" must be proved. *Morrison* v. *California,* 291 U. S. 82, 92 (1934); *People* v. *Scheppa,* 295 N. Y. 359, 361, 67 N. E. (2d) 581 (1946); see also, *Pettibone* v. *United States,* 148 U. S. 197, 203 (1893). The proper charge if Berman had been named as a defendant, could only have been that the jury could convict both or neither. See *Whitaker* v. *United States, supra,* 72 F. (2d) 739, 741; *Feder* v. *United States,* 257 Fed. 694, 697 (C. C. A. 2, 1919); *Regina* v. *Manning,* L. R. 12 Q.B.D. 241 (1883).

The "guilty knowledge" required to make Berman a conspirator necessarily embraced two essentials: (a) That

there was a corrupt agreement by Berman to violate the statute or to do prohibited acts; (b) That Berman knew that petitioner was not an agent for the buyers, for if he were, under the judge's charge (R. 752), the object of the agreement could not have been unlawful.

On each of these essential elements the court should have left it to the jury under proper instructions to determine whether the elements were proved beyond a reasonable doubt. Nowhere did the court so charge. Instead, he, in effect, directed a verdict on the essential issue. Cf. *United States* v. *Murdock,* 290 U. S. 389, 394 (1933).

The Circuit Court of Appeals did not hold that the instruction was proper. It conceded that "the particular sentence may have been misleading" (R. 820). It referred to the instruction as "the objectionable sentence" (*ibid.*). It stated that if counsel had called it to the Court's attention, he would have corrected "any lack of clarity"* (*ibid.*), which implies that it was wrong to begin with. The Circuit Court of Appeals, finally, assumed it was error, *arguendo,* but held it was not such "plain error" as calls for reversal under Rule 54 (b) "when no exceptions were taken below" (*ibid.*).

The question is thus presented of the latitude allowed to Circuit Courts of Appeal in refusing to reverse for lack of exception below in a case where the judge, in effect, directed a verdict on an essential element of the offense. Cf. *Screws* v. *United States,* 325 U. S. 91, 107 (1945); and see *United States* v. *Murdock, supra,* 290 U. S. 389, 394.

The Court's charge in general terms that they must consider each *defendant* separately did not correct the erroneous charge as to Berman, for Berman was not a

*It is difficult to understand what the Circuit Court of Appeals meant by "lack of clarity" for this sentence of the charge was specific and unambiguous.

defendant, and no care was taken to direct the attention of the jury to his particular status, save for the misdirection. Nor could the general language that the testimony of an accomplice must be scrutinized carefully, remove from the mind of the ordinary juror the very specific charge that Berman's testimony "conclusively" established him to be a co-conspirator. See *Bihn* v. *United States,* 328 U. S. 633, 637 (1946); *Drossos* v. *United States,* 2 F. (2d) 538, 539 (C. C. A. 8, 1924); cf. *Shepard* v. *United States,* 290 U. S. 96, 104 (1933).

It is respectfully submitted that the charge was not only erroneous but prejudicial as well, for Berman and petitioner each had a status similar to the other, and Berman had dealings only with petitioner among all the defendants. The testimony in the case at bar was replete with instances where Berman and the petitioner had shared in fees in connection with the transactions. The Court having, in effect, directed that Berman was a party to the conspiracy, the jury undoubtedly concluded that the petitioner must have been part and parcel of the same conspiracy. Indeed, having acquited the other defendants, when the jury came to consider the petitioner, they were confronted with the Court's charge that there was a conspiracy, for otherwise Berman could not have been a co-conspirator. Particularly since Berman's only relations with any of the defendants were with petitioner, petitioner must have been the other party to the conspiracy which had been "conclusively established" by the Court's charge. The jury could not acquit petitioner except by disagreeing with that charge. See *Bihn* v. *United States, supra,* 328 U. S. 633, 637.

The direction of a conclusive finding on an essential element of the crime is reversible error. For, "if the judge may decide that one or another material allegation is proven, he may decide that all are proven, and so direct a verdict of guilty." *Konda* v. *United States,* 166

Fed. 91, 93 (C. C. A. 7, 1908). So it has been held that a direction to a jury that it *must* find the defendant guilty in certain circumstances, was reversible error. *Pelz* v. *United States,* 54 F. (2) 1001, 1004 (C. C. A. 2, 1932).

The power of the trial judge to comment on the evidence is limited. "He may advise the jury in respect of the facts, but the decision of issues of fact must be fairly left to the jury." *United States* v. *Murdock,* 290 U. S. 389, 394 (1933); *Quercia* v. *United States,* 289 U. S. 466, 470 (1933).

The instruction of the judge that Berman's evidence "conclusively" established that he was in the conspiracy prejudiced petitioner beyond recall. It took from the jury the consideration of an essential element of the offense.

The Circuit Court's further view that assuming *arguendo* the charge to be erroneous, it was not "plain error" within the meaning of Rule 54 (b) of the Federal Rules of Criminal Procedure, is contrary to the holdings of this Court that a judge's misdirection on a vital issue can not be construed as harmless error. *Kotteakos* v. *United States,* 328 U. S. 750, 765, 776-777 (1946); *Bollenbach* v. *United States,* 326 U. S. 607, 613 (1946). Under the circumstances of this case even though there was no exception to the charge, this Court should not permit the conviction to stand where the defendant's liberty is involved. *Screws* v. *United States,* 325 U. S. 91, 107 (1945); *United States* v. *Atkinson,* 297 U. S. 157, 160 (1936): *Wiborg* v. *United States,* 163 U. S. 632, 658 (1896); *Williams* v. *United States,* 131 F. (2d) 21, 23 (App. D. of C. 1942).

2. *The prejudicial charge of the Court affected not only the conspiracy count but the substantive counts as well.*

As the court recognized in its charge (R. 752), the conspiracy would not be unlawful unless the objects of the conspiracy were unlawful. Those objects were the "sales" in the substantive counts (R. 750). Having so defined the conspiracy to the jury, the charge that there was a conspiracy implied necessarily that its objects—the transactions in the substantive counts—were unlawful. Since Berman and petitioner were associated in the transactions in the substantive counts their acts could not be disassociated. The court, having permitted the jury to infer that Berman was guilty of the substantive counts as well (for otherwise there was no conspiracy), was permitting the jury to infer that petitioner, too, was guilty of the substantive counts. For it was practically impossible to disassociate petitioner from Berman in this connection. Thus, the misdirection, erroneous and prejudicial as to the conspiracy count, pervaded the whole.

Where there is such pervading error, there must be reversal as to all counts. *Graves* v. *United States,* 165 U. S. 323, 329 (1897). From the moment of the misdirection, petitioner had no chance for a consideration of the substantive counts on the merits without the taint of Berman, as he was labeled by the judge.

POINT II

The Court charged that petitioner could be convicted as an agent for the seller where the sum of his fees from buyers (not shared with the seller), added to the selling price, was in excess of the ceiling price. There is nothing in the statute (50 U. S. C. App. § 901) or the piece-goods regulation (M. P. R. 127) to justify the charge. The strict construction of criminal statutes and regulations was utterly disregarded and the lower Courts failed to follow *Kraus & Bros.* v. *United States*, 327 U. S. 614 (1946). The Circuit Court of Appeals applied a canon of construction which violated the constitutional guaranty of due process of law. *Connally* v. *General Construction Co.*, 269 U. S. 385, 391 (1926).

The Court in addition to charging the jury that petitioner could be convicted as a seller, also charged that he could be convicted as an *agent* of the seller, if the selling price, plus the fees charged by petitioner, exceeded the ceiling prices. We contend that the agency charge was wrong, requiring reversal of the conviction, for it must be assumed that the jury convicted upon the erroneous charge and petitioner thus stands convicted of acts which were not crimes. See *Stromberg* v. *California*, 283 U. S. 359, 368 (1931); *Williams* v. *North Carolina*, 317 U. S. 287, 292 (1942).

We refer first, to the Court's agency charge, and second, to the applicable statute and regulations which demonstrate that that charge was wrong.

1. *The Court's charge.*

The Circuit Court of Appeals accepted petitioner's contention that the charge "was broad enough to include the concept of a seller's agent", and that a portion of that

charge "would in particular seem to constitute a charge of agency" (R. 822, 823).*

The Circuit Court rejected petitioner's contention that an agent of the seller who receives a consideration independent of the seller, when the seller receives no more than the maximum price, is not guilty of a violation of the statute and regulations.

Petitioner contended that there was no language in statute or Regulation (M. P. R. 127) which states that the amount paid by the buyer to the seller's agent plus the amount paid by the buyer to the seller shall not exceed the seller's maximum price.

The Circuit Court nevertheless ruled that the evasion section of Maximum Price Regulation No. 127 applied when a commission was accepted "in connection with the sale" of goods (R. 824). It made no attempt, however, to isolate the "plain language" which would prohibit the commissions of a seller's agent *and would not similarly prohibit the commission of a broker or a buyer's agent.* The latter concededly did not come within the very evasion section.**

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* The Court charged as follows (R. 751-2): "You must be satisfied from the evidence that his efforts in effecting the sales were made *in behalf of the corporations,* that is, the sellers, and not in behalf of the purchasers * * * But if you are satisfied from the evidence that these transactions were effected by Monroe in this manner merely as a means or method adopted *for the purpose of selling piece-goods belonging to or entrusted to these corporate* defendants for sale, and if you are satisfied from the evidence that Monroe's efforts, in spite of their form, were in reality performed *as a service for the sellers* under commitments to Monroe which placed goods under his control for sale, in that case the fees charged by Monroe should be deemed and considered part of the selling price, and under these conditions, if the selling price, *including the fees charged by Monroe,* were in excess of the ceiling price, violations of the substantive counts would be established."

The Court charged similarly on the conspiracy count (R. 752).

** The Trial Court properly charged that commission paid to a *buyer's agent* would *not* be added to the selling price to make an "over-the-ceiling" violation (R. 751, 752).

The Circuit Court of Appeals disregarded the rulings of this Court that criminal regulations, as well as criminal statutes, must be strictly construed. *Kraus & Bros.* v. *United States,* 327 U. S. 614, 621 (1946); *Lanzetta* v. *New Jersey,* 306 U. S. 451, 453 (1939). Instead it seems to have adopted *in a criminal case* the standard that "in the case of a statute so vital to the welfare of the nation * * * we are to have in mind its purpose and construe it accordingly" (R. 824).

It is this very conception that this Court held erroneous in the *Kraus* case. The issue could hardly be more analogous, as we shall see.

2. *The applicable provisions of the statute and Maximum Price Regulation No. 127.*

The statute, violation of which is charged in the indictment, is the Emergency Price Control Act (50 U. S. C. App. §§ 901 *et seq.*).

Section 4(a) of the Act (App. § 904[a]) provides that "It shall be unlawful * * * for any person to *sell* or *deliver* any commodity * * * in violation of any regulation or order under section 2 * * *."

Section 2(a) (App. § 902[a]) authorizes the Administrator to fix maximum prices and § 2(g) (App. § 902[g]) provides that: "Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof."

Maximum Price Regulation No. 127, applicable to finished piece-goods, provides in § 1400.71 that "no person shall *sell* or *deliver* finished piece goods * * * at prices higher than the maximum prices" set forth in § 1400.82.

Section 1400.74 of the Regulation deals with "evasion" and reads as follows:

> "*Evasion.* The price limitations set forth in this Maximum Price Regulation, No. 127, shall not be

evaded, whether by direct or indirect methods, in connection with an offer, solicitation, agreement, sale, delivery, purchase or receipt of or relating to finished piece goods, alone or in conjunction with any other commodity or by way of commission, service, transportation, or other charge, or discount, premium or other privilege, or tying-agreement or other trade understanding, or otherwise."

The Court assumed that petitioner was not "the seller". It also assumed that the consideration he received was a "fee"—and not part of the selling price. Clearly there is no specific language in the statute or Regulation which requires that the fee received by the seller's broker from the buyer, no part of which goes to the seller, is to be added to the selling price for the purpose of determining whether the selling price exceeds the price limitations. The omission cannot be supplied "by the use of policy judgments rather than by the inexorable command of relevant language". *Kraus & Bros.* v. *United States,* 327 U. S. 614, 626 (1946). "Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon the other." *Connally* v. *General Construction Co.,* 269 U. S. 385, 393 (1926).

The evasion section of the Regulation may not be construed to supply the omission, first, because the provisions against evasion could not be more stringent than the statute or the substantive part of Maximum Price Regulation No. 127. As we have seen, nowhere is there any prohibition against a person other than the seller receiving consideration for his services from the buyer. Absent such language, it is fundamental that no prohibition can attach to such conduct. *See Ballew* v. *United States,* 160 U. S. 187, 197 (1895); *Pierce* v. *United States,* 314 U. S. 306, 311 (1941); *McBoyle* v. *United States,* 283 U. S. 25, 27 (1931).

In the language of Mr. Justice HOLMES, in the *McBoyle* case, *supra*, "To make the warning fair, so far as possible the line should be clear."

Second, even standing on its own, the evasion section does not supply the deficiency in the statute and Regulation referred to. That section, so far as relevant, provides that the price limitations shall not be evaded "by way of commission, service, * * * or other charge". The only fair intendment of this language is to prohibit evasion by the seller, *i. e.*, the person who comes within the substantive part of the statute and Regulation. In other words, the seller may not charge more than the maximum price set by the Administrator under the guise of "commissions" or "services" or "other charge". He may not by indirect methods receive *unto himself* a consideration greater than the maximum price allowed him.

The statement in the Circuit Court opinion (R. 824) that "under the plain language of the section" receipt of commission is an evasion, cannot be correct, for obviously the receipt of a commission by a *buyer's* agent was not an evasion. If the Administrator had intended to include the independent commission of a seller's agent, he should have said so plainly in the Regulation. As the Court said in the *Kraus* case, *supra*, 327 U. S. 614, 621:

> "This delegation to the Price Administrator of the power to provide in detail against circumvention and evasion, as to which Congress has imposed criminal sanctions creates a grave responsibility. In a very literal sense the liberties and fortunes of others may depend upon his definitions and specifications regarding evasion. Hence to these provisions must be applied the same strict rule of construction that is applied to statutes defining criminal action. In other words, the Administrator's provisions must be explicit and unambiguous in order to sustain a criminal prosecution; they must adequately inform those who are

> subject to their terms what conduct will be considered evasive so as to bring the criminal penalties of the act into operation."

The Court added (pp. 621-622):

> "The dividing line between unlawful evasion and lawful action cannot be left to conjecture. The elements of evasive conduct should be so clearly expressed by the Administrator that the ordinary person can know in advance how to avoid an unlawful course of action."

In the absence of specific language, both laymen and lawyers would have the right to assume that the normal relationship of agency establishes that the consideration the agent receives is a commission apart from the "price". To negative the normal understanding of men and of the bar for centuries requires, in the interests of elementary fairness, a precise statement in the regulation. See *Lanzetta* v. *New Jersey,* 306 U. S. 451, 453 (1939).

The Circuit Court of Appeals in ruling that (R. 824) "whether semantically Monroe is characterized as a seller's agent or something else" the charge was justified, adopted a dangerous canon of construction. To dismiss the requirement of precise definition of criminal conduct as "semantics" is, in our submission, to disregard the whole history and spirit of our criminal law. See *United States* v. *Wiltberger,* 5 Wheat. 76, 95-6 (1820); *Connally* v. *General Construction Co.,* 269 U. S. 385, 391 (1926); *Pierce* v. *United States,* 314 U. S. 306, 311 (1941).

It is important to note that *at the time of the indictment herein* maximum price regulations in the piece-goods industry did not contain any language making the amount paid by the buyer to a seller's agent part of the seller's maximum price. Not only was there no such language in existence at the time of the indictment, but Maximum

Price Regulation No. 127, dealing with piece-goods, was amended on November 5, 1946, *after the conviction of petitioner,* to so declare. That amendment, which became effective November 11, 1946, *more than a year after the indictment,* reads:

> "§ 1400.88. Treatment of brokers' compensation—(a) Brokers considered sellers' agent. Every broker shall be considered as the agent of the seller and not the agent of the buyer. In each case the amount paid by the buyer to the seller plus any amount paid by the buyer to the broker shall not exceed the seller's maximum price. The term 'broker' includes 'finder' a 'buyer's agent' and *'seller's agent'.*"

Thus "broker" includes "seller's agent" and specific provision is *for the first time* explicitly made that in such case "the amount paid by the buyer to the seller plus any amount paid by the buyer to the broker [seller's agent] shall not exceed the seller's maximum price".

The amendment promulgated *after* the conviction, emphasizes the omission at the time of the petitioner's activities. *Pierce* v. *United States,* 314 U. S. 306, 312 (1941). Surely, if the Administrator thought it necessary to amend his own regulation, a layman could hardly have been expected to insert the amendment on his own motion. The amendment, needless to say, cannot be given retroactive effect, and certainly may not be used to support a conviction antedating the date of its adoption. U. S. Constitution Art. I, § 9, cl. 3.

The omission of reference to sellers' agents in the earlier regulation was not inadvertent. For all inflationary activity was not made illegal. Thus for example, although commissions to a buyer's agent have an unquestionable inflationary effect, yet these were not outlawed by the Emergency Price Control Act, according to the trial court's own charge (R. 752). In each industry the Administrator determined when an inflationary practice had become serious

enough to warrant proscription. Only then did he specifically proscribe it and only then did it become criminal.

On the other hand, at the time petitioner was indicted, maximum price regulations *in other industries than piece goods* specifically defined "sellers' agents" as included within the term "broker" and provided that fees thus paid to sellers' agents shall be considered part of the sellers' maximum price. In the liquor industry, for example, Maximum Price Regulation No. 445, § 7.2a(a), read as follows:

> "Every broker shall be considered as the agent of the seller and not the agent of the buyer. In each case the amount paid by the buyer to the seller plus any amount paid by the buyer to the broker shall not exceed the seller's maximum price plus allowable transportation charges actually paid by the seller or by the broker. The term 'broker' includes a 'finder' 'buyer's agent' and *'seller's agent'*."

It is significant that the above amendment was inserted into the Maximum Price Regulation No. 445 at a time when that Regulation already had an evasion section substantially identical with the one which the Circuit Court of Appeals relied upon in the instant case. Surely, if the Administrator had felt that the general evasion section was sufficient to come within the interpretation of the Circuit Court of Appeals, he would have found it unnecessary to add the paragraph above quoted. That he did insert the above quoted provision establishes conclusively that the Administrator himself did not feel that the general evasion section was sufficient to cover the conduct which the Circuit Court of Appeals by its interpretation now holds to have been prohibited.*

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*For other illustrations, where the Administrator used definite language to interdict the receipt of commission by a seller's agent, see also: Food Products Regulation No. 1, § 2.11; Maximum Price Regulation No. 13, § 10(a)(b) [Softwood and Plywood]; Maximum Price Regulation No. 19, § 14(a)(c) [Southern Pine Lumber].

Moreover, if the Emergency Price Control Act itself had been sufficiently clear to require fees paid to sellers' agents to be included within the sellers' maximum price, there would have been no need to insert "sellers' agents" within the definition of "broker" contained in the regulation above quoted. It is only because the Administrator understood that he had to fill in the omissions in the Emergency Price Control Act in order to effect the prohibition desired that he undertook the establishment of specific evasion provisions in those industries where he deemed it necessary.

As this Court pointed out in the *Kraus* case, the insertion of a provision in one regulation affecting a particular industry, and the omission of similar language in another regulation affecting another industry, demonstrates that a person studying both would have the right to assume that the omission of the specific language made what was unlawful in the other industry perfectly legal in his own. The Court there said (327 U. S. at pp. 625-626):

> "The very definiteness with which tying agreements of all types were prohibited in regard to many other commodities and the absence of any such prohibition in Section 1429.5 of Revised Maximum Price Regulation No. 269 might well have led a reasonable man to believe that tying agreements involving the sale of a valuable secondary commodity at its market price were permissible in the poultry business when the transactions in question took place. Certainly the language used by the Administrator did not compel the opposite conclusion and certainly a criminal conviction ought not to rest upon an interpretation reached by the use of policy judgments rather than by the inexorable command of relevant language."

As Government by administrative regulation necessarily continues to enlarge its scope, the requirement of preci-

sion in the definition of criminal acts becomes more important. We can only benefit from the advantages of Government regulation if we do not lose the safeguards of our liberties in the process. The petitioner stands convicted as an agent for the seller under the Court's charge, although the conduct defined by the trial court was not a crime under the statute or Regulation. To construe the statute as applicable to petitioner in such circumstance violates the constitutional guaranty of due process. *Connally* v. *General Construction Co., supra,* 269 U. S. 385, 391; *Lanzetta* v. *New Jersey, supra,* 306 U. S. 451, 453.

The Price Administrator had power to warn of violations and to enjoin conduct deemed in violation of regulations. When, instead, the Government resorts to criminal sanctions, in the first instance, it should be held to a simple test of clear statement that men will understand. If the case be close, far better that the Administrator be required to proceed by amendment than to substitute for the mandate of language niceties of interpretation where it is difficult to draw the line.

While there was no exception to the Court's charge that petitioner could be convicted as an agent for the seller, an erroneous charge which permits a defendant to be convicted of an act which is not a crime requires a reversal of a judgment of conviction even in the absence of objection or exception. See *Screws* v. *United States,* 325 U. S. 91, 107 (1945), and cases cited *ante,* p. 19.

No substantive crime having been made out, as we have shown, the conspiracy count, as well, must be reversed. Despite appropriate requests to the contrary, the trial judge charged that "if the agreement contemplated transactions to be effected by Monroe and the charge of *fees* by Monroe, which would be in reality a method of disposing of the *seller's* piece goods, then in that case the agreement

to sell goods in that manner would be illegal because Monroe's fees under that set of circumstances would in reality be part of the selling price'' (R. 752).

Since the judge was wrong about this, he permitted the jury to find a conspiracy to do acts which he described as illegal, but which were, as we have seen, legal. In these circumstances, we respectfully submit, the conspiracy count must be reversed for the same pervading error as the substantive counts.

The decision of the Circuit Court is seemingly in conflict with *Kraus & Bros.* v. *United States, supra,* 327 U. S. 614, and establishes a canon of construction of a criminal statute and regulation which would be a dangerous precedent and which is contrary to the standards of construction consistently laid down by this Court. By the judgment below, the petitioner has been deprived of due process of law. *Connally* v. *General Construction Co.,* 269 U. S. 385, 391 (1926); *Lanzetta* v. *New Jersey,* 306 U. S. 451, 453 (1939).

POINT III

The submission of the indictment to the jury, over petitioner's objection, wherein petitioner, without any justifiable basis, is designated as "Monroe Kaplan alias 'John Porter Monroe'," although he had legally changed his name to "John Porter Monroe" five years before the transactions charged in the indictment, deprived the petitioner of due process of law and seriously affected the fairness of the judicial proceeding.

The petitioner was designated five times in count 1 (the conspiracy count) and once in *each* of the other 29 counts of the indictment as ''Monroe Kaplan alias 'John

Porter Monroe' " (R. 9-31). Throughout the trial the petitioner was referred to by the prosecuting attorney and defense as "Monroe". *No reason appears in the record as to why the indictment referred to him as "Kaplan", or why he was designated by an alias, nor did the Government suggest any reason in its brief before the Circuit Court of Appeals.**

After the jury had retired for its deliberation, they requested the indictment (R. 761). Counsel for the petitioner *objected to sending the indictment to the jury, but his objection was overruled* (R. 762). The Assistant United States Attorney, apparently after petitioner's objection to the submission of the indictment because of the alias, offered to excise the name "Kaplan" from the indictment in each of the 35 places it appeared, which would have left 35 holes in the indictment and the name "John Porter Monroe" *in quotation* marks after each hole, and in a different type format from those of the other defendants.**

The Judge, after overruling petitioner's objection,*** explained to the jury that the petitioner had changed his

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*As conclusive of the point that there was no reason for the alias designation we note that the Circuit Court of Appeals, on its own motion, recaptioned the cause in its opinion as *"United States of America* v. *John Porter Monroe"*, omitting from the caption "Monroe Kaplan, alias" (R. 815).

**See footnote, *ante*, p. 5.

***The court stenographer failed to take the colloquy between the Court and counsel after the jury had requested the indictment (R. 761). The Circuit Court of Appeals relied on a colloquy between the Court and counsel *after the verdict* and purported to reconstruct the situation. From its reconstruction it deduced: "When Monroe's [petitioner's] counsel objected, the government offered physically to incise the offending matter from the indictment, *which offer Monroe's counsel rejected*" (Opinion of C. C. A., R. 825). The reference could only be to the colloquy *after verdict* (R. 766f) and we find no statement that it was petitioner's trial counsel rather than the judge who rejected the "offer".

name legally in 1940; that it was agreed to refer to him as "Monroe" throughout the trial; and that since they had requested the indictment, he wanted them to know that " 'alias' means nothing but another name" (R. 761-2).* He further explained that, while people attached criminal significance to that term, "there really isn't any except perhaps as that innuendo has crept into use by the use of the term", and he cautioned the jury not to be prejudiced against the petitioner because of that fact (R. 762).

With the submission of the indictment the jurors learned for the first time that the petitioner Monroe was, according to the document before them, "Monroe Kaplan alias 'John Porter Monroe' ". Realism requires us to face the fact that the word "alias" has a sinister and criminal connotation. In common acceptation, it means a man with a criminal record, and the mild admonition from the Court would not efface the opprobium (cf. *D'Allesandro* v. *United States*, 90 F. (2d) 640, 641 [C. C. A. 3, 1937]). The petitioner had not taken the stand, and jurors who have had any experience know that this often means that a defendant's decision not to take the stand is prompted by the fact that he has a criminal record. The only admonition that might conceivably have diluted the prejudice to some extent would have been a statement by the trial court that petitioner *had no criminal record.*

The Circuit Court of Appeals agreed that "the practice of loading indictments with unnecessary aliases is *inherently* prejudicial" (R. 826). It also conceded that an instruction that had affirmatively stated that petitioner had no prior criminal record "might have been desirable"

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* In the Century Dictionary and Encyclopedia (Rev. & enlarged edition), it is stated, in explanation of the term "alias", that "It is used chiefly in judicial proceedings to connect the different names assumed by a person who attempts to *conceal* his true name and pass under a fictitious one."

(*ibid.*). But it refused to reverse for failure of trial counsel to request that particular instruction (*ibid.*).

Another Circuit Court of Appeals had previously noted that loading an indictment with aliases "may half convict him [the defendant] as soon as the indictment is disclosed to the jury". (*D'Allessandro* v. *United States,* 90 F. (2d) 640, 641 [C. C. A. 3, 1937]). But it too refused to reverse on the same technical ground. Cf. *Lefco* v. *United States,* 74 F. (2d) 66, 70 (C. C. A. 3, 1934).

Thus, the Circuit Courts of Appeal have at least twice recognized the inherently prejudicial character of the indefensible practice but failed to correct it. The orderly administration of criminal justice requires reversal by this Court to prevent the continuance of a practice which is highly prejudicial and unwarranted.

In the case at bar, petitioner did object and did take exception to submission of the indictment to the jury (R. 762). How many times must a defendant object to preserve a fair trial? The Circuit Court of Appeals failed to give any weight to the point that counsel had objected and taken exception.

But even if no exception had been taken to the submission of the indictment, the consequences of extreme prejudice that resulted flowed directly from the Government's action in indicting by "alias" when there was no reason for it. If the trial judge had a difficult problem to resolve, his only recourse was to have refused to give the indictment to the jury under his duty to preserve a fair trial to petitioner.

There was no reason whatever for the trial court to give the indictment to the jury after he was made cognizant of the inherent prejudice of the alias. He should have, in fairness, handled the situation practically by reading to the jury the charging parts of the indictment. The jury would have obtained the information it desired, and the

petitioner would have been protected against prejudice. It was the judge's duty to so act to protect the petitioner against prejudice. Giving the indictment to the jury was wholly unnecessary and, in the circumstances, served no useful purpose. His action should not redound to the prejudice of petitioner who had nothing to do either with the unfair train of circumstances set in motion by the Government or with the failure of his trial counsel to object *again* after he had called the Court's attention to the point of prejudice.

The submission to the jury, during its deliberations, of a criminal record of a defendant, or of his prior conviction, is so prejudicial as to require reversal. (*United States* v. *Dressler,* 112 F. (2d) 972, 977 [C. C. A. 7, 1940]; *Ogden* v. *United States,* 112 Fed. 523 [C. C. A. 3, 1902]). In the instant case, the prejudice is even more extreme. For Dressler, *did,* in fact, have a criminal record and Ogden *had,* in fact, been previously convicted by a jury for the same crime. In our case, the jury could infer that petitioner had a criminal record while, in fact, as the Government must concede, *he had never been convicted of a crime.*

It would be too bad if in federal prosecutions there grew up the practice of searching the personal lives of defendants for the purpose of charging them in the foreign names with which they were born. Our jurisprudence recognizes that sometimes an alias must be charged in an indictment to clarify the evidence that may be introduced. But it is highly improper to charge aliases which have no relevance to testimony proposed to be offered. We think it so improper and prejudicial as to merit the strong disapproval of this Court. The prejudice resulting from such designation made the submission of the indictment so unfair to the petitioner as to require a reversal. To permit this precedent to stand can only invite into the federal criminal jurisprudence a strain which is alien to our system of fair play.

This Court has never had the practice of indicting with unnecessary and irrelevant aliases before it. The only protection that can be given to the fundamental rights of due process involved is by a decision of this Court reversing the judgment below.

CONCLUSION

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing the decision herein of the Circuit Court of Appeals for the Second Circuit.

December 12, 1947.

Respectfully submitted,

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